

**FILED**

NOVEMBER 4, 2010  
NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS

**EFFECTIVE**

nunc pro tunc October 13, 2010  
NEW JERSEY STATE BOARD  
OF MEDICAL EXAMINERS

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF MEDICAL EXAMINERS

In The Matter Of:

STEVEN C. BRIGHAM, M.D.

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\* ORDER DENYING MOTION TO  
\* EXCLUDE EXPERT TESTIMONY  
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This matter was opened before the New Jersey State Board of Medical Examiners ("the Board") on October 12, 2010, upon respondent Brigham's filing of a Notice of Motion to exclude the expert report and testimony of Gary Brickner, M.D. and a letter brief in support of the motion. The Attorney General filed a letter brief in opposition to respondent's motion later in the day on October 12, 2010. We thereafter entertained oral arguments of counsel, offered by Joseph M. Gorrell, Esq., for Respondent, and Jeri L. Warhaftig, Deputy Attorney General for Complainant, on October 13, 2010.

Respondent argues that Dr. Brickner should be disqualified from serving as an expert for the Attorney General in this matter because he "has a conflict of interest that precludes him from providing an expert opinion before this Board in this case." (Respondent's letter brief, p. 2). That conflict is asserted to exist because Dr. Brickner was a member of the State Board of Medical Examiners between 1996 and 1999, and thus was a

member of the Board when the prior action against Dr. Brigham was decided by the Board in August 1996, and a member of the Board in November 1999 when Executive Director Gleason authored a letter to Stuart Phillips, Esq. stating that there would appear to be no problem with the insertion of laminaria prefatory to a termination of pregnancy in an office setting.

Respondent concedes that he is aware of no direct precedent on the issue, but argues that the Board should be guided by ethical standards applicable to attorneys. Specifically, he points to R.P.C. 1.12(a), which provides that "a lawyer may not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, ... unless all parties ... have given consent confirmed in writing." He argues by analogy that Dr. Brickner sat as a judge or other adjudicative officer when he voted, in 1996, to affirm the findings of fact and conclusions of law made at the Office of Administrative Law in the prior action brought against Dr. Brigham. He further argues that Dr. Brickner's expert report addresses "issues that were considered by and decided by" the Board when Dr. Brickner was a member. Based thereon, respondent suggests that were a standard similar to that applicable to attorneys to be applied in this matter, Dr. Brickner could not presently serve as an expert witness evaluating Dr. Brigham's conduct. Finally, respondent relies on case law holding that an expert hired by one

party in a lawsuit may not later serve as an expert for an adverse party in the same lawsuit, even if the expert was terminated by the first party. (Respondent's brief, p. 2).

The Attorney General urges that we deny the motion to disqualify Dr. Brickner, arguing that the prior matter which concluded in 1996 is distinct from that which is now before the Board. The Attorney General points out that the present case is focused upon care that Dr. Brigham provided to five specific patients that were not the subject of the earlier complaint, and that the facts in each of those cases differ from those that were considered in the prior action. She contends that the Board should look for guidance to the standard applicable to former State employees, and points out that former special state officers or employees are not prohibited from working on matters that originated in their former agencies subsequent to leaving state service so long as they had no substantial and direct involvement in the matters. The Attorney General cites to several opinions issued by the New Jersey State Ethics Commission which interpret the term "matter" as applying to a particular case, with a particular set of facts, and argues that the Board should apply that definition and conclude that the 2010 action is an entirely distinct matter from that which Dr. Brickner voted on in 1996.

Upon consideration of the arguments of the parties, we conclude that there is no basis to disqualify Dr. Brickner from

serving as an expert witness in this case, and thus no basis to exclude the two expert reports that he has prepared from the record. Respondent has failed to establish that Dr. Brickner's prior service as a Board member would in any way operate to preclude him from rendering an objective and unbiased expert report in this matter.

Respondent's counsel intimated in oral argument that Dr. Brickner may be biased, or otherwise have an unfavorable predisposition against Dr. Brigham, based on his former service as a Board member. We point out that any such assertion or intimation is belied by Dr. Brickner's voting record, as Dr. Brickner in fact joined in a unanimous vote to dismiss the bulk of the charges that were then pending against Dr. Brigham, to include those related to his insertion of laminaria in an office setting prior to a planned D & E.<sup>1</sup>

We further find that there is nothing in this record that suggests that Dr. Brickner cannot impartially act as a source of information and opinion, for the Board to consider, in this matter.

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In essence, respondent asks that we apply a prophylactic rule that would operate to bar any former member of a Board from serving as an expert witness (for either the prosecution or the defense) in any administrative action initiated after that Board member's service concluded (presumably limited to cases involving licensees whose conduct was the subject of an adjudicated complaint during the course of the Board member's service). We are aware of no such absolute rule, nor has respondent cited us to such a rule. We decline to unilaterally impose that restriction, and instead suggest that the question whether a former Board member would be disqualified from serving as an expert in a case brought before the Board, after that member's service concluded, needs to be analyzed on a case-by-case basis.

Attorneys and expert witnesses serve very different roles in litigation. Attorneys are advocates for their clients, but experts (even though offering opinions on behalf of one party or another) are considered to be objective sources of information and opinion; indeed, as was noted in a case cited by respondent:

The expert disqualification standard must be distinguished from the attorney-client relationship because experts perform very different functions in litigation than the attorneys. Experts are not advocates in the litigation, but sources of information and opinion.

Cordy v. The Sherwin-Williams Co., 156 F.R.D. 575, 580 (D.N.J. 1994).

Given the substantial and recognized differences in the functions that attorneys and expert witnesses serve, we decline to adopt respondent's suggestion that we apply rules that might operate to preclude Dr. Brickner, were he an attorney, from now prosecuting or defending an action against Dr. Brigham. Dr. Brickner's service on the Board ended over eleven years ago. He is not presently being asked to offer an opinion on the same facts that were considered by the Board in 1996, but rather on different facts related to patients whose cases were not before the Board in 1996, and on issues that were never before the Board in 1996. Simply put, this is an entirely distinct matter, and there simply is nothing in the record before us that suggests that Dr. Brickner cannot presently provide objective information and his expert

opinion simply because he sat on the Board when the prior administrative case against Dr. Brigham concluded.

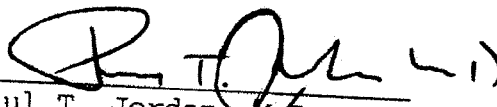
WHEREFORE, it is on this 4TH day of November, 2010

ORDERED nunc pro tunc October 13, 2010:

Respondent's motion to exclude the expert report and testimony of Gary Brickner, M.D., is hereby denied.

NEW JERSEY STATE BOARD OF  
MEDICAL EXAMINERS

By:

  
Paul T. Jordan, M.D.  
Board President